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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TARI LABS, LLC, Plaintiff, v. LIGHTNING LABS, INC., Defendant.	Case No. 22-cv-07789-WHO San Francisco, California Wednesday, March 8, 2023 ZOOM WEBINAR PROCEEDINGS

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE WILLIAM H. ORRICK
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES: (Via Zoom Webinar)

For Plaintiff:

JONAS NOAH HAGEY, ESQ.
BraunHagey & Borden LLP
351 California Street, 10th Floor
San Francisco, California 94104
(415)599-0210

KIRSTEN L. DOOLEY, ESQ.
BraunHagey & Borden LLP
118 W. 22nd Street, 12th Floor
New York, New York 10011
(646) 829-9403

For Defendant:

CHRISTOPHER S. FORD, ESQ.
Debevoise & Plimpton LLP
650 California Street
San Francisco, California 94108
(415) 644-5628

[Additional Attorney Appearances Continue on the Following Page]

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APPEARANCES: (Cont'd.)

For Defendant:
MEGAN K. BANNIGAN, ESQ.
Debevoise & Plimpton LLP
66 Hudson Boulevard
New York, New York 10001
(212) 909-6000

Transcription Service:
Peggy Schuerger
Ad Hoc Reporting
2220 Otay Lakes Road, Suite 502-85
Chula Vista, California 91915
(619) 236-9325

SAN FRANCISCO, CALIFORNIA WEDNESDAY, MARCH 8, 2023 3:06 P.M.

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THE CLERK: Okay. So this is Case Number 22-7789, Tari Labs, LLC v. Lightning Labs, Inc. Counsel, if you would please state your appearance for the record.

MR. HAGEY: This is Noah Hagey for Plaintiff Tari Labs, and I have with me Kirsten Dooley, my associate. Depending on how the argument goes, she will be playing a role as well.

THE COURT: Okay.

MS. BANNIGAN: Good afternoon, Your Honor. This is Megan Bannigan from Debevoise & Plimpton on behalf of Defendant Lightning Labs. With me is my colleague, Christopher Ford, also from Debevoise & Plimpton.

THE COURT: Great. Good afternoon to you, to everybody. So let me tell you how I understand things. On the merits of this motion, I would say that Tari's likely to succeed. It has the trademark at a high level. Both companies made a protocol, the goal of which is to make products such as wallets to transfer assets on blockchains. Lightning says it does it for developers and not consumers, but the fear is that the developers will eventually make consumer-facing products and already one developer-facing product exists called a Taro wallet. Tari has a strong mark conceptually but it's weak in recognition. The protocols seem more weighted and proximate in the market. The marks are similar. They have overlapping marketing channels.

Lightning knew of the name and the potential for reverse confusion, and there's a likelihood of product expansion.

So those -- those factors make me think that Tari is likely to succeed. I am interested in hearing, Mr. Hagey or Ms. Dooley, about irreparable harm. I'd like to know why Tari waited so long. And given the reply that Lightning had just made, where is the harm right now?

MR. HAGEY: Certainly, Your Honor. Thank you. I -- the harm is existential. You can put that product to use. I'd be happy to take you through -- for a company like Tari who's house-smart, every single product, the vast majority of products and services that my client creates have and carry the Tari name. It is what they have invested in. It is what they have invested in. It is what they spent time not only just applying and registering for, but it is how they're out in the world.

And if you look at the comparative statements from both companies about what their goals and objectives are, which are incredibly similar -- to create safe, secure, efficient methods for digital asset creation and transfer, the idea that we could lose that position to an organization that is much larger, that has much broader reach and who literally doesn't care about the name Taro. They haven't sought to register it. They don't care whether they trademark it. They're happy to see it carved into the market by developers and used however it might be used.

It is that asymmetry of risk to my client that not only

just balances the equities but creates this ever-present fear for management, for investors that should the restraining order that Your Honor has already granted not be continued, that what we're going to see is precisely what Your Honor's already seen in the evidence. There is concrete example after concrete example --

THE COURT: Well, just so that I make it very clear -- and I tried to make it very clear the last time -- I didn't enter a -- any sort of a traditional restraining order the last time. I certainly made no findings. So don't -- don't be going off on that as a -- some sort of a basis of argument.

MR. HAGEY: Well, thank you, Your Honor. I mean, I'm certainly not trying to extrapolate too strongly from the prior hearing. But the point in fact that I'm trying to make is we are seeing -- and we've seen -- and I think we have examples after examples -- and I'd be happy to walk through them with Your Honor -- of situations where my client's internal users and my client's external users who communicate with us are like, How could there be a Taro out on the market? And I refer you to our client CEO's Exhibit 1 in his reply declaration where he has a contact, a relationship identifying there's a new Taro protocol out there and emailing him and saying, We're putting on Telegram -- their internal messaging program -- WTF.

If you look at even a raw Google search -- and this is Exhibit 1 to the Dr. Palmatier reply declaration -- you see that third parties are communicating about these protocols

interchangeably. It's not just that they're proximate. It's that they're communicating regarding Tari and Taro interchangeably.

Your Honor asked a very pointed question about harm. When you are looking to develop in a very emerging market, like Tari, so this is explained throughout our client CEO's declaration, and it is common sensical, and you risk losing the traction of having a unique name or you risk a third party like Lightning Labs putting out a competing protocol, not only could developers decide not to work with you, but if both parties are putting out the same protocols at the same time, we have these concrete vignettes, these concrete examples where you're going to see the marks in a lab. And I actually think Ms. Dooley was the person who was closely tied to the research investigation and the client interviews on that, and in response to Your Honor's question I think has a very short summary of exactly what we're talking about, the common sense harm that we believe is going to come in which, frankly, Your Honor, did not appear until very late in the day to us. And I would like for Your Honor to give Ms. Dooley an opportunity to very briefly explain those common sense examples that will demonstrate the kind of harm that our client is concerned about.

THE COURT: Okay. Ms. Dooley.

MS. DOOLEY: Good afternoon, Your Honor. So in our opening brief, we put forward five examples -- creating an NFT, browsing for NFTs, connecting the wallet, using wizards in order

to develop a tool, and infrastructure tools generally. We think that all five of those examples have been -- they were utilized within the Taro web wallet alone.

I'll just take you -- is it possible for me to share my screen?

THE COURT: If you know how to do that, yes, it is.

MS. DOOLEY: I think I'm all set, Your Honor.

THE COURT: Okay.

MS. DOOLEY: So I'll scroll through for the sake of time and just show you the Taro web wallet and how all of these examples are available on that site alone. So I was able to make a wallet account, create a Taro NFT in Taro cryptocurrency within a matter of a couple of minutes.

You'll see here you can mint an NFT just like, for example, one OpenSea page.

And then Example 2 you'll see it says Taro NFTs, Taro cryptocurrencies. These are really clear instances of confusion if you just search for a rare token on a baseball card, for example, and then run into both Taro and Tari on the same platform. And already this is happening just on the first Taro protocol wallet that we've seen.

Saying here the wallet functions allow you to send Taro assets, withdraw Taro assets, and submit Taro invoices. You know, if a user gets confused and thinks that they have a Tari invoice and they actually have a Taro invoice, this is horrible for our

client. This is the exact type of damage that we were trying to prevent with the TRO and preliminary hearing injunction.

It also allows me to send Taro as a currency. So despite Defendant's claim that they will never have a Taro test token, they'll never have Taro tokens out there, they already have them, Your Honor.

And saying -- actually, here it's mint currency and examples are numerous within the Taro web wallet alone. And so we really believe that our five examples have come to fruition within a matter of weeks and there's already over a hundred wallets created on this website and we believe that just the instances of confusion are clear and concrete, and this is the exact type of activity that Defendants have encouraged on the website. They have talked about how wallet developers will need to have Taro keys. That means that it can't be just a Bitcoin key or a tablet key. The wallets have to be Taro-compatible in order for users to use them. And this is going to lead to the confusion that we have discussed in our papers throughout, Your Honor.

THE COURT: All right. Thank you.

MS. DOOLEY: Thank you.

MR. HAGEY: Yeah, and I think that just the capstone on that part of Your Honor's question is the viable nature in which the Defendant is seeking to have its project, have its protocol be embedded into the cryptocurrency and blockchain markets. They actively want third parties to take it and use it as broadly as

they can.

And so once that infringing virus, if you will, is out of the lab, there's -- we're not going to be able to put it back. We're not going to be able to stop users go out and get all these third party inventory infringers all around the world and have them cease what they're doing.

And by the same logic, if you think about the business reputation risk, the transactional risk to innocent third parties who are going to be searching for Tari or Taro transactions and potentially running into situations where, just like if Your Honor was, you know, at a supermarket or trying to make a transaction online using Visa and there's a Viso credit card payment method and you accidentally select the wrong one and then you see an error message, that's going to render your interest in using that method much more infer (ph).

And so we think this is the quintessential situation where the Ninth Circuit has said in particular circumstances, particularly where a product hasn't launched, where it hasn't gone out into the market and affected the market yet, where it is my client's house name, it is a name for Lightning Labs which is literally almost, you know, some virtual kind of random name they wanted to use as part of their cap root system (ph), where they have an infinite number of alternatives and where it could take hours, much less than a day -- certainly much less time than counsel has spent opposing this motion -- to simply change, we

think the balance there is incredibly in favor of ensuring that the status quo remain, that my client not suffer that kind of harm to its name, trade, and reputation, that we don't put blockchain and cryptocurrency consumers at risk for that kind of conduct.

Your Honor asked one other question. That was, you know, "Mr. Hagey, why -- why didn't you guys sue these people right away? Why didn't you race and run to court?" And I have several common sense very straightforward answers.

The first is we wanted to give peace a chance. We know how much Your Honor loves trademark cases, but we also know how difficult and challenging and expensive it is for a client like ours to raise a federal piece of litigation against an adversary who's well-funded and large as Lightning is. And it's not as though we didn't make clear that we believe we own this and it was a concern. And in response to that, we got false assurances. Hey, we're not going to be out there. It's not going to be public-facing. You're not going to see people making Taro wallets. You're not going to see people making Taro tokens or engaging in Taro-related transactions. And that had an effect. We heard those communications. We still tried to reach out. We still tried to do the right thing. And it -- and, frankly, Your Honor, it wasn't until we saw that not only were they doubling down after we filed this lawsuit and had their first Taro developer conference, but then when we saw they had another one a month later where they were planning to imminently launch

something that was going to be commercially-workable, that we said, "Okay. We have no choice here. We're going to have an expert. We're going to have a survey." That takes time. And we're going to put an end to this.

And along that entire stretch of time, we were constantly saying, Can't we just have you guys change your name? Can't you just do a search and replace and change your name so that we don't have to go through what is going to be an incredibly expensive exercise in this court. And that kind of burden on a party of Tari's size is not insignificant.

And so, you know, there's many cases that we cited where there's been longer delays. The bottom line is we did not wait until they launched. We took action reasonably to ensure the market wouldn't be affected and so we wouldn't put the Court in an undesirable position of trying to grant this kind of relief after the bell had already been rung.

And so in that context, we think it's not only reasonable but that it is warranted under the circumstance, and I appreciate Your Honor's consideration of my answer.

THE COURT: Thank you. All right. Ms. Bannigan, why don't you start -- start with irreparable injury and then go to any arguments you want to make with respect to the merits.

MS. BANNIGAN: Yes, Your Honor. Thank you. What I haven't heard from Mr. Hagey today is any excuse for why -- any reasonable and truthful excuse for the delay. Because as the

Court knows, delay factors into the irreparable harm analysis when looking at whether the Court should grant this extraordinary emergency relief for a TRO.

The case law is clear. To the extent that parties sit on their rights and they unreasonably delay in seeking this emergency relief, the emergency relief is not available.

Now, Mr. Hagey tells a story about -- well, a changing story. When Mr. Hagey first filed a brief and when Plaintiffs first filed this brief, the notion of why they needed emergency relief is this notion that there was a big acceleration in the development process.

As Lightning last pointed out in its opposition, there has been absolutely no acceleration in the development process. And actually I'll share our screen also to make this point perfectly clear.

Okay. On the screen -- on the screen, you'll see a bar graph. That is included in ECF No. 39 of our filing. And what we've added to that is a timeline of what's happened. Taro was announced in April of 2022, nearly 11 months ago. And you see Taro -- you see that on the first bar graph all the way to the left here. The public announcement was followed by -- what the public announcement was was Lightning Labs saying, We have this great idea. It's called Taro. It's a protocol for highly sophisticated Bitcoin developers. We're beginning to develop the software.

And so for the next -- from April to September, it developed the software. And you can see here from April to September, that was the software development that was done after this very public announcement. And by the way, the announcement was picked up by the press. It was picked up by the community. And it was picked up by Plaintiff because Plaintiff did approach Lightning Labs in April -- and I'll get to that in a moment.

What happened in September -- and you can see the September area -- that's the box that we put it onto our graph -- September is when Lightning Labs released the code, so they made the code public through Dica. This is an open-source protocol. Open-source, by its very nature, means that it is public. It means that it's out in the open and it's not just Lightning Labs developing the software. The open software is -- the open-source software is is the community comes together to help you develop this.

So while Lightning Labs is where he's developed this protocol, it's also getting feedback and it's getting software requests and there's constantly code being spit out sometimes on a daily basis, sometimes on an hourly basis. So this chart shows commits. And what "commit" means in this language is a commit means that a new piece of software is being spit out into the open-source protocol.

And so starting in September, everything you see on this chart highlighted in the box is the software code that was being

pushed out publicly by Lightning Labs. And we can see that there wasn't much variation in the amount of code that was being pushed out, but it was consistent. It was being pushed out again, like I said, daily, sometimes weekly, sometimes even hourly.

Nothing has changed except for you can see the end of the chart from two weeks when the Court issued the status quo order, all software releases stopped.

We understood Your Honor's status quo order to say, Plaintiffs are complaining that there's going to be an acceleration if there's going to be a release of this new version. Don't do any -- don't do that release of the new version before a companion motion.

In the utmost caution to be sure that Defendants in no way went awry the Court's order, we had Lightning Labs stop all software development at all, so this is not just -- this has nothing to do with releasing an actual new version, but that software development that was happening every day since September also put a halt to that. And there have been serious implications as a result of that which I will get to.

So -- so that's since September. That was months ago. That's what? -- five months ago?

MR. FORD: Five months.

MS. BANNIGAN: Five months ago -- sorry -- math in my head -- clearly not my strong suit. Five months that this software development publicly has been going on.

Now, what Plaintiffs have said here today is, Well, we didn't feel the need to file the lawsuit or to bring this emergency motion because we were being misled. We were having ongoing negotiations and we thought that Defendant Lightning Labs was going to do the right thing. But let's look at what actually happened. What actually happened is that this protocol was announced with a lot of attention on April 5th, 2022, almost 11 months ago.

Liz Stark, who is the CEO of Lightning Labs, ran into Mr. Jain of Tari Labs, at a conference shortly thereafter. Mr. Jain sent her a text message, a screenshot of which we have included in our papers, that said, "We need to talk about your Taro Wee (ph). We think it could cause confusion with our Tari mark. Ms. Stark responded very directly and said, "This is not a consumer-facing protocol. This is named after a root vegetable. We don't think there's going to be any confusion."

What happened after that, I believe, as Liz Stark explains in her declaration, the two ran into each other face-to-face, still at the same conference. The conversation was exceedingly short. And at no time did Ms. Stark say, "I'm considering changing my name" or "I'll change my name." Ms. Stark has been clear from the very beginning. She is committed to the Taro name. Lightning Labs is committed to the Taro name. It has a very big meaning to the Nigerian co-founder as a vegetable that he grew up on. He has given speeches holding taro chips. This is

a highly, highly sophisticated environment. Nobody is going to be confused. And by the way, we definitely don't want to be confused with Tari Labs. So, you know, we're not -- it's not that we're overlooking confusion. It's not that we don't care about the name, as Mr. Hagey suggests. It's that we truly believe that there is no confusion here.

So that's an input. In June, a couple of months later, Taro is still getting attention in the press. It's being developed. Mr. Spagni, who's one of the co-founders or Tari Labs, sends a message to Ms. Stark saying something along the lines of the same thing. I believe what he said -- and I'm paraphrasing -- is, My attorney tells us that we're going to lose our trademark rights if you don't change the name. You have to change the name.

Ms. Stark did not respond to that. She never said one thing in response and she didn't like that there were attorneys involved. She continued to feel very strong that there's no confusion here. She didn't respond. She absolutely did not send a message that she was considering changing her name or that she was doing anything different.

And fast forward to September 12th. Again, months later for the first time Tari Labs sends an official cease and desist letter. And Lightning Labs responded to the cease and desist letter a week or two later. The response to the cease and desist letter once again makes clear, We are not changing the name. There is no likelihood of confusion.

And then on -- just a day later, the code was issued publicly under the Taro name, bringing us to the public software code that's been happening every day since then.

Now, Mr. Hagey made representations today that there were these conversations happening and that they tried to talk to us. There were two conversations that happened. One conversation, as I understand it, is a former counsel from Wilson Sonsini sent an email to Mr. Hagey and his team saying -- requesting an extension to filing an answer to the complaint. They said, We won't give you the full extension. We'll give you half of the extension. And we demand that you change your name.

There was no conversations about settlement. It was a straight-up demand. We demand that you change your name. Once again, we did not agree to that. Everything continued as is.

The next thing that happened is I replaced the Wilson Sonsini lawyer as counsel to this case and that happened -- I believe that was just last month. The day I joined the case, I sent an email to Mr. Hagey introducing myself, asking if we could have a conversation because I wanted to see what the issues are and to see if we could potentially resolve this. Mr. Hagey did not respond to that request, except for to point out a typo that I made with respect to a name, a name having nothing to do with Tari, saying, no, he would not give me an extension to file the answer even though I had just joined the case, and once again demanding that my client change the name.

I didn't respond to that email.

So this notion that there were conversations and that they were somehow being misled in any way and software was out in the public being worked on every day since September or that there were ongoing conversations happening are just not true.

And the case law does not allow this gamesmanship to raise emergency motions. This is extraordinary relief and that is not the basis, any basis, for Tari Labs sitting on their rights for this long. They may believe that they are going to be harmed. We don't believe that to be true. But the law is the law in terms of this extraordinary immediate and temporary relief, and they have not shown any cases that go to the otherwise, that they've now changed their mind and think they might be harmed, or maybe they weren't paying attention. I don't know what it was. But the delay -- they haven't shown -- they were able to -- they were perfectly fine with the delay until now. Nothing has changed. There is no basis on that factor alone for the grant of a TRO or even an PI.

THE COURT: So why don't you move to the merits, Ms. Bannigan.

MS. BANNIGAN: Yeah. Absolutely. It won't surprise you to know that I do disagree that there's a likelihood of success on the merits here. And I think what's happened here is that Tari Labs has thrown a lot of mud. They've restated a lot of facts. They've made a lot of misrepresentations. They've grossly over-

exaggerated some facts.

THE COURT: Okay. So let's just go to the argument. Okay?

MS. BANNIGAN: Yes. When you cut through the mud, the question is: Is there any likelihood of confusion? And you have to look at what the facts actually are. And what the facts are is that Lightning Labs is a developer of open -- to open-source Taro protocol. This is a specialized piece of software that can only be used by Bitcoin developers on the Bitcoin blockchain. Those developers are the only audience for Taro and they have not been and they will not be confused.

Now, it's important to understand what Taro actually is meant to do. To the extent that Taro works and becomes a fully-functioning development protocol, the point is to help use Taro to free the financial world and make monetary transactions securely available in the emerging markets.

How is Taro going to help do that? It's -- for the first time, it's a valiant way to efficiently and securely and more easily, to the extent it works, create digital assets on Bitcoin. Now, Bitcoin was the original blockchain. It has had several developer followers who believe that Bitcoin is the best blockchain because it was the most secure blockchain, but the problem with Bitcoin has been that you don't have the opportunity to create these digital assets.

Now, there are other blockchains -- Ethereum and Monero

and it's much easier to create digital assets on those blockchains. Bitcoin has not had the capability. But to give you an example of what we're talking about with digital assets, one common example -- and the example that Lightning Labs is laser-focused on -- are the creation of stablecoins. Right now on digital assets, you cannot create stablecoins efficiently or securely on Bitcoin. Now, Bitcoin uses the Bitcoin currency. The Bitcoin currency is extremely volatile. It fluctuates every day and many people do not want to use it because of the ability to lose its value so quickly. Stablecoins are the opposite. Stablecoins are stable currency, so one stablecoin will be backed by a dollar. One stablecoin equals one dollar in a common example.

You can do this on Ethereum right now. And I'm going on about this because it is important to understand what we're doing. On Ethereum, you can create stablecoins. And how you create stablecoins on Ethereum if you're a developer is that you use the ERC-20 protocol. That's the equivalent of Taro on Bitcoin. And this allows for the creation of stablecoins.

Now, Taro will work in Bitcoin the way that ERC-20 works on Ethereum. ERC-20 allows companies like Circle, Tether, Paxos to create stablecoins. They -- I think they are three of the most popular stablecoins in the United States right now.

Now, consumers who use these stablecoins, they have never heard of ERC-20. They know nothing about this actual

developer protocol that allows them to create the stablecoins. And some of them don't even know the companies that put out the stablecoins -- the Circles, the Tethers, or the Paxos. What they know are the names -- the name of the stablecoin. And in that scenario, the name of the stablecoins for those three companies are USDC, USDT, and USDP. And these are used interchangeably, one letter difference, with no confusion, and that's because there's incredibly crowded field marks in the blockchains, and we'll get to that point.

So what Tari Labs has done is they've repeatedly argued over and over again that Taro is going to be used by ordinary consumers and that Taro's going to be marketed towards ordinary consumers. And that's just not right. Companies or developers may use Taro to create other products. That's the whole point of Taro. But those consumers are not going to use Taro itself.

And we talked about in our brief how Taro can be analogized to other background protocols like MySQL or SMTP. Tari Labs has had no response to that. Ordinary consumers watch TV every day. Ordinary consumers send email every day. And they know the brand names for their streaming services, like the Netflixes and Plutos. And they know the brand names for their email servers, like GMAP or Apple. But what they don't know are the protocols that the companies use to make those streaming services and email services work, like MySQL, which is the background protocol that makes Netflix work, or SMTP, Simple Mail

Transfer Protocol, that makes our emails work.

You know, Taro would work the same way -- behind the scenes, developers building things with different consumer-facing needs.

As we said in our papers over and over again, Lightning Labs does not offer and has no plans to ever offer Taro products such as a Taro blockchain, a Taro wallet, a Taro token. And I will address the Taro web wallet now.

So Taro web wallet is something that Tari Labs brought up in its reply. And as we explained in our surreply submission, the Taro web wallet we believe only further demonstrates that the Taro Wee is used by sophisticated developers. Now one look at the website -- I have just a snippet here on this top slide -- but one look at it makes clear that this is not something that's intended for consumers. This -- it says, "We expect these to work with trees and Schnorr signatures," and this is not something that an ordinary consumer would have any idea if they're looking at what is Taro.

And this is clear by how this developer has actually used the wallet and the feedback that he has -- he has been asked in the developer community. We found when we looked at posts that he made on Stacker News. Stacker News is a forum for technical Bitcoin-enlightening discussion. And, in fact, when we discussed this Taro web wallet with the CEO, Elizabeth Stark, she said, "Oh, let's look on Stacker News. I'm sure if he's developing anything,

there will be comments on Stacker News" because apparently it's a very common channel for Bitcoin developers to use to discuss the protocol.

And what we see here is a recent post from the end of January where he's asking for help and feedback on his development of this Taro web wallet. So what you see here is a Taro web wallet that's in the incredibly early stage of development. This is -- it's found on the *testnet.tarowallet.net* website. It is not something that an ordinary consumer would ever find. Contrary to the images of Plaintiff's brief, it does not appear in the App Store. It will never appear next to Tari Aurora, and it's something that even though we have no control over it, we fully expect we will never actually be granted it in a consumer-facing way as Taro, and that's because Taro for Bitcoin is going to be a generic name. There's not going to be this rush of everybody naming everything Taro. And we see that with the stablecoin examples in our brief. They're not named ERC-20 wallets. They're given their own name to the extent they ever get to consumers.

This is in such an early development stage, we don't know that a consumer would ever use this wallet. It's a separate -- it's a side project for this developer who has a full-time job. It's something that he does for fun. It is way too early to give it some kind of unique name for marketing. Those are decisions that are made much later when the product is actually going to launch.

THE COURT: Ms. Bannigan, why don't you respond to the presentation that Ms. Dooley had and tell me why that is -- it shouldn't concern me.

MS. BANNIGAN: Absolutely. I -- Your Honor, to be quite candid, I was a little bit confused with the presentation that Ms. Dooley made. I have never seen those exhibits before. They aren't in my materials that were actually submitted with the reply papers. But it seems to me that what she was showing was screenshots of what it might look like, so the extent that the wallet launch and Taro was also the competing wallet.

I see Ms. Dooley shaking her head, but I truly did not understand what it was.

But what I can say is what Plaintiffs have done is they have said over and over again there are these five situations in which we might see confusion and that's in the creation of NFTs, that's in the sale of NFTs, that is in the creation of smart contracts, and that is in -- on these developer websites. And I'm -- we're a bit perplexed of why they keep bringing up these examples, and the only thing that we can think of is because they weren't able to identify any real evidence of confusion. So what they did here -- and these are exhibits that were actually taken from the reply brief -- they created Photoshop exhibits. And I believe that's what they did with Ms. Dooley. And so what we see here on the left -- this is -- what you see here on the left where there's a "C" on top and this is what OpenSea currently looks

like. OpenSea is a platform which ordinary consumers can indeed go on to shop for, to create, and to buy NFTs. And so when you're creating an NFT, you have to check what blockchain your NFT is going to live on. And so if you see the arrows, the red box and the arrows, that was put there by Plaintiffs when they submitted the exhibit, and so when you look at the exhibit on the left, "C," this is what OpenSea looks like today. And you look at all of those names of blockchains. Obviously, Tari is not there because Tari is not an active blockchain right now. And Taro is not there because Taro is not a blockchain at all.

Now, if you go to "D," this is an exhibit they put in and they say, Illustration. This is what it will look like in the future if you allow this harm to take place. And we again sort of box around blockchain. And there, they're Photoshopping Tari and Taro. But this is completely out of the realm of what's possible. And to assess likelihood of confusion, it has to be reasonable confusion, actual -- actual confusion. We have said there is going to be no Taro blockchain. This speculation that simply because there's a Taro protocol, that somebody's going to go make a completely separate blockchain and name it Taro because Lightning Labs has this development protocol, it's just not realistic. It's completely speculative. And Photoshopped evidence cannot be the basis for any decision on this extraordinary emergency relief.

If this is what we're dealing with, if this could

potentially --

THE COURT: Ms. Bannigan -- Ms. Bannigan, rather than go off on flights of rhetoric, if you can focus -- I'm going to give you ten --

MS. BANNIGAN: Yes.

THE COURT: -- more minutes to -- or less -- to say anything else that you think will change my mind. And I -- my mind is not going to be changed by rhetoric.

MS. BANNIGAN: Thank you, Your Honor. And I just feel so passionate about this, but I --

THE COURT: I can tell.

MS. BANNIGAN: -- appreciate your -- and I do truly believe in this case, so thank you very much, Your Honor.

So, you know, put simply, Tari Labs' five examples that they have shown where its ordinary consumers might see the names of blockchains, it's just not realistic, and Taro might be the name of a blockchain like one day if all goes well. It's possible. But Taro is a protocol that's used to trade assets on Bitcoin blockchain and so these examples, they just are not realistic.

But I want to bring the Court back to some of the other important CPACT (ph) factors here which I really do believe show real likelihood of confusion. And the first one is sophistication. Understanding the consumers who are actually going to be -- encounter this mark is just absolutely essential to

understanding whether these consumers are likely to be confused. And here, the consumers of the Taro protocol are not ordinary consumers at all. They're extremely sophisticated technical users who are extraordinarily careful about what they use.

And I think it's important to pause here for a moment and address some of the charges that Tari Labs has been leveling at Elizabeth Stark, the CEO. And Ms. Stark is a highly technical, accomplished woman at the very top of her field. And she didn't ever mislead Tari Labs about the Taro -- that Tari Labs was somehow going to be confused for Taro. And I've already explained how she was clear in her interactions that she wouldn't change the name. But she was also clear in one interaction she had that this was not a consumer-facing product. And that's because it's not. They've repeatedly twisted her words to say that her saying it's not consumer-facing means that it's not public-facing. But open-source code is public by its very nature. And you can see here this is a conference that happened -- I believe this was April 6th, the day after the Taro protocol was announced, and you see a picture of Mr. Osuntokun who is the Nigerian co-founder who's eating a bag of taro chips. I'm not sure if that's legible. And here's a slide that he presents it.

And these conferences that he goes to to present are highly technical conferences with highly sophisticated Bitcoin developers. You see there -- and I've been looking for a way to say "Merkle Sun Sparse Merkle Tree," and I can't pretend that I

understand what that means, but it comes up over and over and over again in these presentations.

Asset ID generation. Even if an ordinary consumer somehow stumbled upon this, an ordinary consumer would not understand what this is and certainly not that it was related to Tari Labs in any way.

Sophisticated developers like Ms. Stark, like Professor Jake Cusin (ph), who is the head of Cusin University's Center for Decentralized Power through Blockchain Technology in the DeCenter at (indiscernible), that's one of the most prominent universities and centers in the country right now studying this technology. As they have all said, these developers understand the difference between consumer-facing products and developers-facing products. And this creator of the Taro web wallet certainly did, which is why he asked developers to (indiscernible) it.

And it's just -- it's just not practical that this underlying development protocol with SMTP or MySQL is something that is going to be used by ordinary consumers.

We also have to take this in the context of the crowded field, and that's -- I appreciated Your Honor's statement that this mark may be strong conceptually but that it's weak commercially. I agree with that. But it's also weak because there is a very crowded field. And in a crowded field, consumers know how to take care because there's a lot of overlapping ways. Cryptocurrency is perhaps the quintessential crowded field. And

here on this slide, you see there's the Taraxa Project which has the Tara token, different from Taro and Tari by one letter. There is the Taki token, again different by one letter. There is the Atari token, adding one letter, and then there is Tari. And that's just the tip of the iceberg. We have several examples in our brief of ways in which Bitcoin, Monero, Blockchain, Cryptocurrency -- it's an incredibly crowded field, including with the stablecoin examples I gave earlier.

Now, it's important to consider this also when we're thinking about another CPACT factor which is that Tari and Taro are different in sight, sound, and special meaning. Yes, it's true that they have only one letter difference, but it's important to compare these two marks in the context of this crowded field where consumers are seeing Taro and Taki and Tara and Tari and Atari. The differences among those marks are sharpened and consumers take extra care. Although Tari and Taro share that -- those first three letters, courts have held that even a single-letter difference can be significant and, as here, when the marks have fundamentally different meanings, and we're looking at the context of how these words are actually going to appear to consumers.

Now, that brings me to actual confusion. We know that Tari (indiscernible) to Taro because it has actually (indiscernible) to Taro for the 11 months since it announced its protocol and the five months since it's been spitting out code.

I'll start by briefly addressing Dr. Palmatier's survey that Tari Labs submitted with its motion. That survey is nothing more than a screening test, which courts routinely reject. Courts -- and we've cited to cases -- Mr. Hagey is also counsel of record for both of those cases -- in which the court rejected the survey saying -- one saying it was seriously flawed, another saying it was flawed, both declining to rely on it.

And that's because the consumer -- the survey showed consumers single words, they called those words products sometimes, and then asked consumers in a leading question which words were likely from the same company. Any one of those flaws alone would make this survey unreliable. But all of this taken together mean that the survey can't be trusted at all.

And so without the survey, what's left? What's left are typos, one question or a comment, WTF, and one completely nonsense article. And that -- none of that evidence would stand screening.

I'll address first the article that Mr. Hagey mentioned that was submitted with Dr. Palmatier's reply declaration. And you see an excerpt of that article here. This was an article published by a company, Speed. The website is *tryspeed.com*. And this is incoherent at best. My best guess is that this was written by an artificial intelligence chatbot. I'm actually astonished that Tari Labs submitted this as evidence of confusion because the -- the article doesn't even accurately describe Tari. Its descriptions of Tari and of Taro are completely wrong. I

don't know what it's talking about. Neither one of them is on Ethereum, and this article just has absolutely no relationship to reality, so you certainly can't say that this was in any way caused by the Tari protocol.

Going to the typos, the six typos, we need to be really clear on that point. Because it characterizes so much of what Tari Labs is trying to do in this case. They want to argue that the stakes are the same as actionable confusion. And it's not actionable confusion that's important. That's not the law. Actionable confusion here is the relief that Tari Labs makes to Taro protocol. And that people who would go to use the Taro protocol or go to use Tari Labs' products, wherever they are, would somehow be confused. And there is absolutely no evidence of that in any way, shape, or form.

THE COURT: Okay. Ms. Bannigan, you'll want to wrap up right now. We've got to --

MS. BANNIGAN: Absolutely. I'll address one more point very, very shortly and that's the last CPACT, the last factor, which is marketing, and marketing is -- you know, the Internet marketing channels that are used by the parties, such as Twitter, Substack, and GitHub, they're ubiquitous. And the Ninth Circuit has made very clear over and over again that when you're dealing with these marketing channels on the Internet, that's irrelevant to the CPACT analysis because all software development companies use those channels. And that goes along very well with the -- the

(indiscernible) and the *Dfinity* case that this Court made where the Court says -- ties it back to -- it purports -- mentions that this marketing factor is irrelevant and also says that in dealing with these blockchain developers, in dealing with developers who are highly sophisticated in these intricacies -- this intricate tech, it is implausible that they would be confused. In that *Dfinity* case -- it's *Dfinity v. Meta Labs* and it's directly on point.

The very last thing that I will say, Your Honor, in closing is that to the extent Your Honor believes that Tari Labs' likelihood of success is a close call, we do not believe it is a close call. But if the Court does believe it is a close call, the irreparable harm factor is especially important because companies that are truly harmed by trademark infringement don't wait months before filing a complaint. They don't wait an additional four months before filing for relief. And as the cases in the Ninth Circuit make clear, that this is a balancing test and if likelihood of success on the merits is questionable even at a close call, more weight needs to be given to the irreparable harm factor.

THE COURT: Thank you, Ms. Bannigan.

MS. BANNIGAN: Thank you, Your Honor.

THE COURT: All right. Mr. Hagey, I'll give you ten minutes to respond.

MR. HAGEY: I'm happy to, Your Honor. The first thing

I will say is the Defendant's client, when she's out in the market describing what they're trying to do here, is saying that "Taro user is somebody who doesn't want to understand the protocol of Bitcoin. It's just somebody who wants to transact cheaply and verbally without holding the coins themselves." And that's a quote from the statement that she made that's attached in connection with the Jain declaration.

She then analogizes Taro to the credit card system. And we don't disagree that, you know, a lot of consumers don't know how Visa or MasterCard or American Express work. But in order to know whether you can actually transact business on that network, you've got to know whether you're using a Visa card. And for us, the situation here is no different. The reason those vignettes that Ms. Dooley was walking through are so important is because these are concrete examples of what's going to happen if somebody makes -- creates an NFT or a token using the Taro protocol and they want to sell it and it's worth something, they need to know whether the recipient and the transfer system is going to work. And the only way to do that -- and this is how -- we gave examples of how this is done through wallets. We gave examples of how this is done through OpenSea. You go and you look and you determine what protocol or what blockchain system is available to make that transaction, and that's the dropdown name that we're going to see if Taro is allowed to proceed.

So that is first one just very, very basic point. The

entire project around Taro is to embed something into our financial system within cryptocurrency and digital assets that is going to be, as counsel said, generic. They want to generify the word "Taro" and have users use it all over the place. And we agree that's the problem. Once this genie is out of the bottle, we can't put it back in. Once protocols are put into place and the system replicates throughout the entire Internet, the entire cryptocurrency universe, we're not going to be able to stop that. The only time to do that is now.

And when we think about the -- you know, the questions about what does the case law say, what is the likelihood of confusion or weight into irreparable harm, here you have marks that are virtually identical, we have companies that are operating in the same space, they use all the same methods to communicate with their clients, they attend the same conferences, they acutely know each other. And my client worked hard to try to convince Lightning Labs to stop doing this.

We don't have an obligation to immediately go after somebody or everybody who might be out in the market, and we certainly have an opportunity to wait and see and determine whether there is going to actually be a launch and whether something is actually going to happen. A lot of projects that come and go in cryptocurrency never get off the ground fully.

And so before you spend a lot of money and a lot of time, and you go up against an organization as large at Lightning

Labs, you are definitely going to make sure that there is something that you need to move with this.

And I think that's the primary area of concern here, is that we moved -- as soon as it was clear that they were actually going to release something commercially, that it was going to come into effect in less than a month, we filed our papers as quickly as we could pull them together and pull in a survey which, by the way, was using the marks in the same manner in which Lightning Labs itself shows and demonstrates on their own website.

I'll just close with this. Your Honor has been very patient with the parties and allowed us to do quite a bit of argument. To me, this comes down to a (indiscernible) situation. You have one party that cares very deeply about its name. Its name is everything for the company. Tari is -- is synonymous with what my clients have been trying to build. They are very passionate about their work.

And they applaud the work that Lightning Labs does. But they cannot create a situation where all of their work is suddenly put at risk and consumers and developers are put at risk to be confused in the manner in which we clearly have shown not only is likely to occur but in fact has occurred. In fact, Defendant's own counsel couldn't keep the names straight in their correspondence with us, and there's many court cases, particularly from the patent infringement context, where it's shown that that is itself demonstrative of a potential confusion or infringement.

So we ask that, you know, you not chop up this baby. We ask that our Tari baby be allowed to proceed intact and that the existing restraint -- the existing stand-still order remain in effect so that our client can go forward with its business without fear or risk of having the world change should Taro release their (indiscernible) and become commercially available as their CTO said within a matter of weeks.

And with that, I appreciate Your Honor's patience with us.

THE COURT: All right. Thank you, all, for your argument. I do -- I will get an order out as quickly as I can. I recognize the difficulties that -- that any order poses to both sides, but certainly to stop people from operating is -- requires some disruption.

And -- and then after that comes out, we'll see where we go as -- as quickly as we can so that whichever side is unhappy with my decision will get another crack at it and get a crack on the merits as quickly as possible. But that will wait for another moment or two.

Thank you, all, for your argument.

MS. BANNIGAN: Your Honor, can I just bring up one clarifying question about the order that is currently in place right now, please?

THE COURT: Yeah.

MS. BANNIGAN: So our understanding is that order is to

keep the status quo as it was at the time. As I mentioned earlier, we took that to mean that Lightning Labs should not release this version -- Version 0.02 that Plaintiffs were worried about.

THE COURT: Uh-huh.

MS. BANNIGAN: And out of the utmost caution, we also stopped what we had been doing on a daily basis, which is just working on the open-source protocol in public which involves spitting out new code, not in a new version or anything like that. To truly keep the status quo, it would be to allow Lightning to continue doing everything it had been doing since September. It would be very helpful for the Court to clarify the order so we can make sure that Lightning Labs does not run afoul of it.

THE COURT: Well, so I didn't -- so I think you did the right thing in advising your client to stop because I was not -- I am learning more and more as time goes on, but I -- the -- working on open-source is -- I was concerned about. And I think I would keep that advice for the next day or two and I will try to -- I won't get out a full-blown order in that period of time, but I -- I will try to be as clear as I can be at that point.

MS. BANNIGAN: Thank you very much, Your Honor.

THE COURT: Thank you, all.

MR. HAGEY: Thanks, Your Honor.

MS. DOOLEY: Thank you, Your Honor.

THE CLERK: And that concludes this afternoon's

calendar. Thank you, all.

(Proceedings adjourned at 4:06 p.m.)

I, Peggy Schuerger, certify that the foregoing is a correct transcript from the official electronic sound recording provided to me of the proceedings in the above-entitled matter.

Peggy Schuerger March 15, 2023

Signature of Approved Transcriber Date

Peggy Schuerger

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